Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-734

McDONNELL DOUGLAS CORPORATION,

Petitioner,

-against-

HYCOM INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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No.

McDONNELL DOUGLAS CORPORATION,
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-against-

HYCOM INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, McDONNELL DOUGLAS CORPORATION, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 13, 1979.

OPINIONS BELOW

Ninth Circuit: The opinion of the court below in this case (Appendix A, infra, pp. 1a – 5a) was not reported.

The order of the court below denying petitioner's petition for rehearing and amending the court's opinion (Appendix A, infra, p. 6a) was not reported.

District Court: The opinion of the United States District Court for the Central District of California (Appendix B, infra, pp. 7a-9a) was not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 13, 1979. A timely petition for rehearing was denied on August 13, 1979, and this petition for certiorari was filed within 90 days after that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The buyer under a contract for the sale of goods sued the seller for breach of the contract. The contract contained a provision that purported to entitle the buyer to recover the $90,000 purchase price of and the tooling for producing the goods if they were nonconforming and not reasonably usable for the buyer's purposes. The buyer received, paid for and used the goods for several purposes, including incorporating them in articles that it sold to others. The buyer did not return the goods to the seller. Except for generally characterizing its suit as one for damages for breach of contract, the buyer did not express a legal theory in the District Court. It cited neither statute, case nor text authority. It introduced no evidence of actual damages or of the difficulty of determining them or of the reasonableness of the $90,000 provision. The District Court, after a nonjury trial, awarded the buyer $45,000 and the tooling but in doing so failed to express the legal theory upon which its award was based. The District Court's opinion and findings cited no statute, case or text authority for its decision. The Court of Appeals determined that the buyer was entitled to $90,000 and the tooling. The questions presented are:

1. Should the Court of Appeals have awarded to the buyer the full purchase price of the goods and the tooling

notwithstanding the buyer's acceptance of and failure to make an effective revocation of the goods and notwithstanding a total lack of evidence of actual damages sustained by the buyer?

2. Was it proper for the Court of Appeals to enforce the $90,000 provision as a liquidated damages provision and to preclude any consideration on appeal of the reasonableness and appropriateness of the liquidated damages because those factors had not been considered in the District Court, notwithstanding that the action was never characterized in the District Court as one for the enforcement of a liquidated damages provision?

3. Was it proper for the Court of Appeals to substitute a $90,000 award for the District Court's $45,000 award without remanding the case to the District Court for clarification and further findings, notwithstanding the Court of Appeals' admitted failure to understand the District Court's theory of the case and notwithstanding the existence of uncontroverted evidence of substantial benefit to the buyer from the seller's performance?

4. Was it proper for the Court of Appeals to award $90,000 and the tooling to the plaintiff in a breach of contract action for damages notwithstanding a total lack of evidence of any damage to the plaintiff?

5. Is the procedure whereby the defendant, by failing in the District Court to anticipate the possible, unexpressed theories of the plaintiff's case and controvert elements of such theories, is precluded on appeal from controverting such elements proper?

6. Was it proper for the Court of Appeals to affirm a part of the District Court's judgment that gave the buyer credit for certain returned goods notwithstanding that the record was barren of any evidence of such returns because the District

Court expressly ruled against the buyer's efforts to introduce such evidence?

STATUTORY PROVISIONS INVOLVED

California Commercial Code:

"*§2606. What Constitutes Acceptance of Goods.*

(1) Acceptance of goods occurs when the buyer

(a) After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) Fails to make an effective rejection (subdivision (1) of Section 2602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) Does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit."

***

"*§2607. Effect of Acceptance; Notice of Breach; Burden of Establishing Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.*

(1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this division for nonconformity.

(3) Where a tender has been accepted

(a) The buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

***

(4) The burden is on the buyer to establish any breach with respect to the goods accepted."

***

"*§2718. Liquidation or Limitation of Damages; Deposits.*

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty."

***

STATEMENT OF THE CASE

On May 18, 1973, Nitron Corp., which was subsequently merged into McDonnell Douglas Corporation, the petitioner herein, and Hycom Incorporated, the respondent herein, entered into a written agreement by which Nitron was to design, manufacture and sell to Hycom large quantities of sets of electronic devices. The agreement contemplated that Nitron would initially deliver 20 engineering samples of the device sets and Hycom would use its best efforts to determine their suitability for Hycom's purposes. If the samples neither conformed to the agreement specifications nor were suitable for Hycom's purposes, then Nitron was to redesign the devices and deliver new samples. Thereafter, Hycom was to buy at least 2100 of the device sets. Hycom was to pay $90,000 for the samples and associated development and a price per set decreasing from $300 to $90 for the remaining sets.

Article 12 of the agreement read, in pertinent part:

> "In the event Seller, despite its best efforts is practicably unable to produce engineering sample sets that conform to Buyer's logic drawings and product specifications, or if nonconforming, that are reasonably usable for Buyer's purposes, then this Agreement shall terminate and neither party shall have any further liability; provided, however, that in the event of such termination Seller shall deliver to Buyer
>
> a) all of the $90,000 described in Paragraph 4 above, to the extent paid by Buyer; and
>
> b) all tooling, including copies of composite drawings suitable for digitizing, artwork (rubyliths), mask masters, and card decks pertaining to the circuits as theretofore developed by Seller."

Nitron made several attempts to produce samples that conformed to the specifications but was unable to do so. Finally, Hycom, in what it stated was a conditional acceptance, took delivery of 20 samples and paid the $90,000 price. Hycom retained these samples and used them for various purposes, including incorporating them in goods it sold to its customers for $350,000.

Thereafter, Nitron continued its efforts to improve the design and Hycom took delivery of several additional device sets. Despite its taking delivery of these additional sets, Hycom insisted that they were "tolerable only" and "not reasonably usable for buyer's purposes."

Hycom alleged (and, although not conceded by the petitioner, the District Court so found) that Nitron repudiated the agreement in January, 1975, and Hycom brought this action in the District Court based upon diversity of citizenship. The agreement was signed in and was to be wholly performed in California.

Hycom's complaint (R. 1-3)[1] styled itself as being for "breach of contract and damages". The complaint alleged a default by Nitron, made reference to Article 12 of the agreement and asked for judgment for $90,000, delivery of tooling and "such other and further relief as is just".

The petitioner's answer (R. 5) admitted the jurisdictional matters and the agreement and generally denied the rest of the allegations. It also asserted as affirmative defenses that Hycom had accepted the 20 sample sets and that Hycom had failed to state a cause of action. The petitioner also counterclaimed for $23,053.51 for the unpaid price of the additional device sets sold and delivered to Hycom. Hycom's reply to the counterclaim (R. 8) admitted that some of the goods were sold and delivered to it but denied indebtedness.

The District Court's pre-trial conference order (R. 61-71) described Hycom's claim as one "for $90,000 damages based upon the alleged breach of defendant's contractual obligations". It found that the fact of Hycom's incorporation of certain of the sample sets in goods that it sold to its customers was admitted. Among the issues of law that were to be litigated were:

> "Whether defendant is obligated under the terms and provisions of the Agreement dated May 18, 1973, as supplemented and modified, to reimburse plaintiff in the total sum of $90,000 representing all installment payments made to defendant for certain engineering sample sets and associated development work and to deliver the items of personal property described in paragraph 12 of said Agreement", and
>
> "Whether plaintiff's claim for damages is barred by California Commercial Code §2602 entitled 'Manner and Effect of Rightful Rejection'."

---

[1] "R." refers to the record as certified by the District Court to the Court of Appeals.

Neither the pre-trial conference order nor any other document filed by the court or by either party in the District Court proceedings used the phrases "liquidated damages", "rescission", or "specific performance" or equivalent language to describe the theory of Hycom's case. No case or statutory authority was ever cited to support any theory.

The District Court tried the case without a jury. At the conclusion of Hycom's case, the petitioner moved for a directed verdict (Tr. 402)[2] upon the express ground that "the evidence has not established facts sufficient to create a cause of action". The motion was summarily denied (Tr. 411).

The District Court issued its memorandum opinion (Appendix B), which concluded:

> "An assessment of all the evidence leads to the conclusion that each side gained a benefit from the efforts of the parties and that the state of the art was improved in a manner beneficial to the business and engineering capacities of both. Certainly the plaintiff has advanced its producing capabilities as a result of the efforts made by defendant to solve the engineering mysteries. On the other hand, defendant acknowledgely (sic) did not produce a test perfect product and gave up, perhaps too early. Each side should bear part of the cost.
>
> "It is ordered that defendant pay to plaintiff $45,000.00 less any amounts due defendant pursuant to the parties (sic) November 11, 1976 stipulation and that defendant shall return to plaintiff all items mentioned in contract paragraph 12(b)."
>
> "Plaintiff shall prepare proposed findings of fact and conclusions of law consonant with this memorandum..."

[2] "Tr." refers to the reporter's Transcript on Appeal certified by the District Court to the Court of Appeals.

Hycom prepared proposed findings of fact and conclusions of law that were modified aand adopted by the court (R. 158-170). Neither the findings nor the conclusions were any more specific regarding the theory of Hycom's case than was the memorandum opinion.

The findings and conclusions resulted in the petitioner's being awarded the sum of $10,331.14 on its counterclaim, presumably in accordance with a stipulation between the parties (R. 148-150). The $10,331.14 reflected a credit to Hycom of $15,570.00 for goods returned to Nitron after the complaint was filed. By the terms of the stipulation, this credit was to be allowed Hycom only if the court found that the returns were valid. The District Court ruled (R. 401) that Hycom could not introduce evidence of the returns and, as a consequence, no such evidence was introduced and the petitioner had neither the opportunity nor any apparent necessity to introduce rebuttal evidence on the point.

Both parties appealed to the Court of Appeals, which issued a memorandum (Appendix A) substituting $90,000 for the $45,000 awarded to Hycom by the District Court and otherwise affirming the District Court's judgment except for a minor point regarding interest. The Court of Appeals denied the petitioner a rehearing and denied the petitioner's motion to recall the court's mandate.

REASON FOR GRANTING THE WRIT

The Disposition of this Case by the Courts Below Demonstrates Such an Abrogation of Judicial Responsibility in the Interest of Expediency as to Merit the Exercise of this Court's Supervisory Powers.

This case, which results in an undamaged plaintiff's recovering a significant judgment, has wended its way through

exhaustive proceedings in both the District Court and the Court of Appeals without the benefit of any judicial statement of the legal theory or theories upon which the recovery is based.

Was this a suit to enforce a liquidated damages provision? Hycom certainly didn't say so in those words and neither did the District Court. There was no citation to the controlling California statute on liquidated damages in contracts for the sale of goods, California Commercial Code §2718, or to any other authority dealing with liquidated damages. Since part of the recovery sought and awarded was the delivery of personal property, perhaps the action was one in equity to enforce specific performance. If so, it was never identified as such. Hycom characterized its action as being one to recover damages for breach of contract. Yet the express language of Article 12 of the contract had nothing to do with breach of contract. Rather, it seems to contemplate rescission of the contract by agreement between the parties.

The Court of Appeals didn't say that it was enforcing a liquidated damages provision, although this might be inferred from its opinion. Indeed, it recognized that reasonableness and difficulty of ascertainment of actual damages are necessary elements to the enforceability of such provisions, but then pointed out that there was no evidence introduced with respect to these elements.

If the Court of Appeals' decision was based on the concept that it was incumbent upon the petitioner to prove the absence of these elements, then that decision was totally at odds with the established California rule[3] that the plaintiff seeking to

[3] Effective on July 1, 1978, after the conclusion of the proceedings in the District Court, California Civil Code §1671, upon which the California rule was based, was significantly modified.

enforce a liquidated damages provision has the burden of establishing the impracticability or difficulty of fixing the actual damage. *Rice v. Schmid*, 18 C.2d 382, 115 P.2d 498 (1941). There seem to be no California cases dealing with the extent to which this rule applies to California Commercial Code §2718. Since the Court of Appeals didn't publish its opinion, it is doubtful that it intended to overturn the California rule or to blaze a new trail. Indeed, the Court of Appeals' Footnote 2 suggests that it didn't consider this to be a question of liquidated damages at all.

What has really occurred in this case is plain. With all due respect, the District Court never demanded that the plaintiff identify the theory or theories of law under which it was proceeding and, probably because of what it considered to be the unimportance of this case compared to the remainder of its case load, simply failed to devote any serious analysis to it. The case received similar short shrift in the Court of Appeals, which seems to have adopted the unprecedented position that it was the defendant's pre-trial responsibility to hypothesize all of the various unexpressed theories that the plaintiff might be pursuing and to expressly controvert them in order to alert the plaintiff that he must prove the necessary elements of his theories.

This case may be unimportant in and of itself. But surely even such unimportant cases are entitled to some minimum level of meaningful attention on the part of the judiciary.

In order to establish such a minimum level and buttress the integrity of Federal judicial process against the temptations of expediency, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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APPENDIX A
OPINION OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, JUNE 13, 1979

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HYCOM INCORPORATED, a California Corp.,
Plaintiff-Appellee,

v.

McDONNELL DOUGLAS CORPORATION, a Maryland Corp.,
Defendant-Appellant.

HYCOM INCORPORATED, a California Corp.,
Plaintiff-Appellant,

v.

McDONNELL DOUGLAS CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California

Before: HUFSTEDLER and KENNEDY, Circuit Judges, and CLAIBORNE,* District Judge.

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* Honorable Harry E. Claiborne, United States District Judge for the District of Nevada, sitting by designation.

The dispute in this case is centered upon a written contract between Nitron Corp. (which subsequently merged into McDonnell Douglas Corp.) and Hycom, Inc. Under the contract, Nitron agreed to produce twenty engineering sample sets of packaged metal oxide semiconductor–large scale integration (MOS/LSI) circuits. These sample sets were to be manufactured in conformity with logic drawings and product specifications identified in the contract and supplied by Hycom. As engineering difficulties were encountered, these specifications were modified by mutual agreement.

Hycom agreed to pay Nitron in periodic installments a total of $90,000, as partial reimbursement for the engineering samples and associated development. Hycom alleged that circuits produced by Nitron were not in conformity with the contract and that it was therefore entitled to return of the $90,000, and of certain tools, all as set out in paragraph 12 of the contract.[1] The district court concluded as a matter of fact that the samples did not conform to the modified specifications and were not reasonably usable. It therefore ordered that all the tools described in subparagraph 12(b) be returned. However, rather than also order return of the $90,000 as required by subparagraph 12(a), it concluded that Hycom was only entitled to $45,000.

Nitron contends that the disctrict court erred in its conclusions of fact concerning whether the circuits were conforming or reasonably usable, whether there had been an accord and satisfaction and whether Hycom had waived its rights. Having reviewed the record, we cannot conclude that the district court's determinations were clearly erroneous on these matters. The only issue, therefore, is whether the district court was correct in limiting its award to $45,000, instead of the $90,000 provided by the contract. We conclude that the $45,000 award is not supportable.

Nitron contends that the district court must have concluded that the $90,000 constituted liquidated damages and that the amount was unreasonably large and void as a penalty. At no time during the trial was the issue raised concerning whether the clause requiring return of the $90,000 was void as a penalty. Courts generally list three criteria by which a valid liquidated damages clause can be distinguished from a penalty: the parties must have intended the amount to be for damages rather than a penalty, the damages that would result from the breach must be uncertain or hard to estimate, the stipulated amount must not be unreasonable. *See* Cal. Civ. Code § 1671; Note, A Critique of the Penalty Limitation on Liquidated Damages, 50 So. Cal. L. Rev. 1055, 1061 (1977). None of these factual questions were included in the pretrial memorandum. The validity of the clause was simply never treated as an issue in the case and therefore absolutely no evidence was presented on this matter.[2] There does not appear to be any basis to believe the trial court's judgment was based on a theory that the $90,000 constituted unreasonable liquidated damages.

The district court stated that the reason it was only awarding $45,000 was that "Hycom has advanced its producing capabilities as a result of the efforts made by Nitron to solve the engineering mysteries." This suggests that the district court may have been relying on a theory of unjust enrichment. We doubt that such a theory is supportable because the contract itself is reasonably interpreted as contemplating the possibility that Nitron could engage in substantial engineering and development work to no avail; yet the return of the monies advanced by Hycom was stipulated unless the sets were conforming or reasonably usable, and they were not. The condition for the return of the money having arisen, Nitron had a duty to perform which was not excused by any of the covenants of the contract or by operation of law. In any event, the

defendant has never advanced a theory of unjust enrichment. Moreover, there was no testimony by any expert or anyone else that placed a value on the benefit derived by Hycom. Therefore there is no factual basis for the district court's apparent conclusion that Hycom derived $45,000 worth of benefit from the contract.

Although the judgment of the district court has appeal as a Solomonic resolution of the case, it does not appear factually or legally supportable. We conclude that Hycom is entitled to receive back $90,000 as provided by the contract.

Nitron also raises an issue concerning its counterclaim. Nitron's position apparently is that during the trial the district court concluded that Hycom was not entitled to rely on the fact that it returned some of the circuits after the case was filed. Nitron then argues that in view of this holding by the district court, the court "misread and misapplied" the stipulation. We do not believe the district court misread the stipulation. Nitron's concerns about a misunderstanding of the stipulation were called to the district court's attention in post-trial motions and rejected. It appears that the district court simply concluded that it was proper to consider the circuits which were returned in November 1975. Nitron does not argue that it was error for the court to reach this conclusion; it instead contends, based on statements made at trial, that that was not what the court held. However, it is the final written judgment which controls, not informal remarks made by the court during trial. *Segars v. Atlantic Coast Line R. R. Co.*, 286 F.2d 767, 770 (4th Cir. 1961). It is clear the district court concluded that it was proper to take into account the return in November 1975 to Nitron by Hycom of certain circuits. We affirm the judgment on the counterclaim.

Finally, with respect to interest, we conclude that interest is due only on the net amount of $90,000 minus $10,331.14 or

$79,668.86, *see Burgermeister Brewing Corp. v. Bowman*, 227 C.A.2d 274, 38 Cal. Rptr. 597 (1964), but that the district court properly awarded interest beginning on March 14, 1975, *see* Cal. Civ. Code § 3287(a).

AFFIRMED in part and REVERSED in part.

---

[1]Paragraph 12 of the contract provides:

In the event Seller, despite its best efforts, is practicably unable to produce engineering sample sets that conform to Buyer's logic drawings and product specifications, or if nonconforming, that are reasonably usable for Buyer's purposes, then this Agreement shall terminate and neither party shall have any further liability; provided, however, that in the event of such termination Seller shall deliver to Buyer

a) all of the $90,000 described in Paragraph 4 above, to the extent paid by Buyer; and

b) all tooling, including copies of composite drawings suitable for digitizing, artwork (rubyliths), mask masters, and card decks pertaining to the circuits as theretofore developed by Seller

[2]It is not clear that the $90,000 could ever be properly characterized as a penalty since that clause simply requires that if Nitron fails to perform its side of the bargain, it must return the consideration it received.

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HYCOM INCORPORATED, A California Corp.,
Plaintiff-Appellee,

v.

McDONNELL DOUGLAS CORPORATION, a Maryland Corp.,
Defendant-Appellant.

HYCOM INCORPORATED, A California Corp.,
Plaintiff-Appellant,

v.

McDONNELL DOUGLAS CORPORATION,
Defendant-Appellee.

Before: HUFSTEDLER and KENNEDY, Circuit Judges, and CLAIBORNE,* District Judge.

The opinion is amended at page 3, line 3 by inserting after "*See*" the citation "Cal. Comm. Code § 2718; . . ."

The petition for rehearing is denied and each party is ordered to bear its own costs.

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* Honorable Harry E. Claiborne, United States District Judge for the District of Nevada, sitting by designation.

APPENDIX B
OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, NOVEMBER 29, 1976

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HYCOM INCORPORATED,
a California Corporation
Plaintiff,

vs.

McDONNELL DOUGLAS CORPORATION,
a Maryland Corporation
Defendant.

In May, 1973, Nitron Corp. (owned by McDonnell Douglas Corporation) contracted to produce 20 engineering sample sets of packaged MOS/LSI circuits for use in Hycom's Modem. Hycom was to finish production of the Modem for sale to its customers Magnavox and 3M. Hycom furnished Nitron with logic drawings and product specifications and the circuits were to meet rigid test requirements. Plaintiff was to pay defendant $90,000.00 as partial reimbursement for the engineering samples and then to purchase up to 20,000 sets of the final production circuit configurations.

Paragraph 12 of the contract provides in pertinent part:

> "12. In the event Seller, despite its best efforts, is practicably unable to produce engineering sample sets that conform to Buyer's logic drawings and product specifications, or if nonconforming, that are reasonably

usable for Buyer's purposes, then this Agreement shall terminate and neither party shall have any further liability; provided, however, that in the event of such termination Seller shall deliver to Buyer

a) all of the $90,000 described in Paragraph 4 above, to the extent paid by Buyer; and
b) all tooling, including copies of composite drawings suitable for digitizing, artwork (rubyliths), mask masters, and card decks pertaining to the circuits as theretofore developed by Seller."

The circuits Nitron agreed to use its best efforts to produce were scientifically unique and attempts to produce the chips per specifications were not completely successful. As time went on, plaintiff agreed to revisions of the specifications when it appeared that the present state of the art precluded defendant from exactly meeting all of plaintiff's demands. In fact, defendant spent $620,000.00 trying to turn out final production circuits that would even satisfy the modified specifications of Hycom. It delivered certain samples to plaintiff which represented a yeoman-like effort to conquer the problems that defied total success, but then used less and less manpower on the project and finally, after a change in exectutive leadership, abandoned all efforts and advised plaintiff it could go no further. Plaintiff sues to regain the $90,000 it paid and for the other materials paragraph 12 of the contract mention.

Defendant counterclaims for the value of certain sets it claims it furnished plaintiff under the contract but for which it did not receive payment.

Defendant contends it owes plaintiff nothing because although it is admitted that no (possibly one) engineering samples were produced which met the original specifications, those which were delivered pursuant to agreed relaxed specifications were "reasonably usable for buyer's purposes" within the meaning of paragraph 12 of the contract.

An assessment of all the evidence leads to the conclusion that each side gained a benefit from the efforts of the parties and that the state of the art was improved in a manner beneficial to the business and engineering capacities of both. Certainly the plaintiff has advanced its producing capabilities as a result of the efforts made by defendant to solve the engineering mysteries. On the other hand, defendant acknowledgely did not produce a test perfect product and gave up, perhaps too early. Each side should bear part of the cost.

It is ordered that defendant pay to plaintiff $45,000.00 less any amounts due defendant pursuant to the parties November 11, 1976 stipulation and that defendant shall return to plaintiff all items mentioned in contract paragraph 12(b).

Plaintiff shall prepare proposed findings of fact and conclusions of law consonant with this memorandum and a proposed form of judgment by December 15, 1976.

DATED: This 29th day of November, 1976.

DAVID W. WILLIAMS,
United States District Judge